Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. ~~77~~-1425

CLAUDE D. BALLEW,
Petitioner.

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

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The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on November 16, 1977.

OPINION BELOW

The opinion of the Georgia Court of Appeals is not yet reported, but a copy thereof is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on November 16, 1977. Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on January 6, 1978. A copy of said denial is set forth herein in Appendix E. The Court's jurisdiction is invoked under Title 28 United States Code §1257(3).

QUESTIONS PRESENTED

1. Whether the jury instructions on *scienter* allowing a finding of "constructive knowledge" in an obscenity case are sufficient to meet the constitutional minimum standards of *scienter* set forth in *Hamling v. United States*, 418 U.S. 87 (1974)?

2. Whether the films on which Petitioner was convicted may, as a matter of law, be held obscene or whether they constitute speech protected by the First and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix D hereto.

STATEMENT

Petitioner was convicted in the Criminal Court of Fulton County of distributing obscene materials, the charges being predicated upon the exhibition of two films at the Paris Adult Theatre in Atlanta, Georgia. Petitioner was alleged to have been an employee of the theatre at the time.

Petitioner was then tried before a jury in the Criminal Court of Fulton County and found guilty. He thereafter

appealed his conviction to the Georgia Court of Appeals which affirmed the trial judgment in all respects in a judgment and opinion for which review is sought by this Petition.

REASONS FOR GRANTING THE WRIT

I.

THE CHARGE TO THE JURY ON THE ISSUE OF *SCIENTER* FAILED TO MEET THE MINIMUM CONSTITUTIONAL STANDARDS ENUNCIATED BY THIS COURT IN *HAMLING V. UNITED STATES*, 418 U.S. 87 (1974).

The jury which tried Petitioner instructed in an improper manner upon the issue of *scienter* or knowledge on the part of the Petitioner. As to the issue of knowledge, the jury was instructed as follows:

> "[T]he word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

The instruction to return a verdict of guilty upon a finding of "constructive knowledge" is patently erroneous when the current constitutional minimum standards of *scienter* are considered. The most recent decision of this Court on the requirements of *scienter* is *Hamling v. United States*, 418 U.S. 87 (1974). There, the Court states:

> "We think the 'knowingly' language of 18 U.S.C. §1461 and the instructions given by the district court in this case satisfy the constitutional requirements of scienter. It is constitutionally

sufficient that the prosecution show that the defendant had knowledge of the contents of material he distributes, and that he knew the character and nature of the materials."

As the above decision clearly demonstrates, the Constitution requires a finding of actual rather than constructive knowledge. The requirement of actual knowledge is necessary to eliminate the chilling effect which will flow from any lesser standard. *Smith v. California*, 361 U.S. 147 (1959). As the Court stated in *Mishkin v. New York*, 383 U.S. 502 (1966):

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent to the definition of obscenity."

The present constitutional minimum standard of *scienter* clearly requires actual knowledge. The trial Court erroneously instructed the jury that a finding of guilty could be predicated upon constructive knowledge.

This Court has already granted certiorari on this precise issue involving an identical instruction in *Ballew v. Georgia*, No. 76-761, *cert. granted*, 429 U.S. 1071 (1977). Because the conviction in what case was unanimously reversed on other grounds, the *scienter* issue was not addressed on the merits. *Ballew v. Georgia*, No. 76-761; decided March 21, 1978. The fact that certiorari was granted on the *scienter* issue in that case, however, demonstrates the seriousness of the question and establishes that a writ should be granted herein to resolve the issue with plenary review.

The identical issue is also before the Court in two other Georgia cases at the present time. It is presented in the jurisdictional statements in *Sewell v. Georgia*, No. 76-1738,

docketed June 7, 1977 and in *Teal v. Georgia*, No. 77-790, docketed December 1, 1977.

II.

THE FILMS UPON WHICH PETITIONER'S CONVICTION RESTS MAY NOT, AS A MATTER OF APPLICABLE CONSTITUTIONAL LAW, BE HELD OBSCENE SINCE THEY CONSTITUTE EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the films upon which Petitioner's conviction is predicated. The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injuctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter. This Court reversed in a judgment announced by Mr. Justice Harlan.

The Court thought the dispositive question to be whether or not the magazines were in fact obscene, 370 U.S. at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue below:

> "Whether this question [of obscenity] be deemed one of fact or of mixed fact and law, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determination of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see *Grove Press, Inc v. Christenberry* (CA 2 NY) 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, states:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. United States*, supra, 354 US, at 497-498, 2 L ed 2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional

> judgment involved in every obscenity case.' Id., at 498, 1 L ed 2d at 1514; see *Manual Enterprises, Inc. v. Day*, 370 US 478, 488, 8 L ed 2d 639, 647, 82 S Ct 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be unconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court only recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based

upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the two films upon which Petitioner's conviction rests.

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sadomasochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts,* 383 U.S. 413 (1966) ("Fanny Hill"); *Aday v. United States,* 388 U.S. 447 (1967) ("Sex Life of a Cop" described at 357 F.2d 855); *Corinth Publications v. Westberry,* 388 U.S. 448 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio,* 388 U.S. 453 (1967) ("Orgy Club"); *Hoyt v. Minnesota,* 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books); *Grove Press v. Gerstein,* 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women, films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal area; and films depicting lesbian sexual activity and hetero-sexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the

female genitalia and sexual gyrations." *Pinkus v. Pitchess,* 429 F.2d 416 (CA 9 1970), *affirmed sub nom. Pinkus v. California,* 400 U.S. 922 (1970).

When the two films here are considered as a whole and judged against press materials of a similar or more explicit nature heretofore determined by this Court not to be obscene, the conclusion is inescapable that they constitute protected speech under the First and Fourteenth Amendments to the Constitution of the United States. It should be held and Petitioner's conviction should thus be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

Respectfully submitted,

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APPENDIX "A"

Nov. 16, 1977

54540. BALLEW v. THE STATE. B-163

BELL, Chief Judge.

A review of the evidence in this case conclusively shows that the evidence demands as a matter of law that the films "Dream Come True" and "The Heist" are obscene and are nothing more than hard-core pornography. Thus the conviction and sentencing of the defendant for criminal violations arising under Code § 26-2101 are affirmed.

All other enumerated errors have no merit.

Affirmed. McMurray and Smith, JJ., concur.

APPENDIX "B"

SUPREME COURT OF GEORGIA
CLERK'S OFFICE

Atlanta 1/6/78

Dear Sir:
Case No. 33250, Ballew v. The State

The Supreme Court today ..... the writ of certiorari in this case.

Malcolm, C.J., Hall, P.J., absent.

Very truly yours,
MRS. JOLANE B. WILLIAMS, Clerk

APPENDIX "C"

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law . . . abridging the freedom of speech, or the press . . . "

2. The pertinent provisions of the Fourteenth Amendment are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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PART I

OPINION BELOW

The decision sought to be reviewed by this court is reported at 144 Ga. App. 238 (241 S.E. 2d 19).

QUESTIONS RAISED

1. Whether jury instructions on scienter that required the State to prove beyond a reasonable doubt that the accused had knowledge of the obscene nature of the magazines sold by him, either actual or constructive, and that a person has constructive knowledge of the obscene content if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material, were sufficient to meet constitutional minimum standards.

2. Whether the Motion Picture Films *Dream Come True* and *The Heist* are obscene as a matter of law and therefore not protected expression under the First and Fourteenth Amendments to the Constitution of the United States.

PART II

ARGUMENT AND CITATIONS OF AUTHORITY

A.

JURY INSTRUCTIONS ON SCIENTER THAT REQUIRED THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD KNOWLEDGE, EITHER ACTUAL OR CONSTRUCTIVE, AND THAT CONSTRUCTIVE KNOWLEDGE IS KNOWLEDGE OF FACTS WHICH WOULD PUT A REASONABLE AND PRUDENT PERSON ON NOTICE AS TO THE SUSPECT NATURE OF THE MATERIAL, WERE SUFFICIENT TO MEET CONSTITUTIONAL MINIMUM STANDARDS.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

> "(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, *knowing the obscene nature thereof*, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowing', as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and *a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material . . .*" (Emphasis added)

The trial court charged the jury on scienter according to the provisions of the Georgia statute, supra, and this charge is in keeping with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when the court held that the person charged with the offense of mailing obscene material must know *or have notice of the contents* of the material.

> "The inquiry, in proceedings under Rev. Stat. §3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." (Emphasis added) *Rosen v. United States*, 161 U.S. 29 (1896).

Rosen did not require the accused to have knowledge of the obscenity of the material, only *notice of its contents*.

> ". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.
>
> We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. . ." *Smith v. California*, 361 U.S. 147, 154 (1959).

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

> "a reading of the statute (§1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the court construed 18 U.S.C. §1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

In the caseof *Kuhns v. California*, ____ U.S. ____, 97 S.Ct. 2938, this court denied petition for certiorari to review jury instructions based upon the California obscenity statute which defines "knowingly" as "(be) aware of the character of the matter . . ." *California v. Kuhns*, 61 Cal. App. 3d 735, 132 Cal. Rptr. 725, 737 (1976).

In the case of *Nash v. United States*, 229 U.S. 373 (1913), the court said:

> "In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti-Trust Act on the ground of uncertainty as to the prohibitions."

Whenever the law draws a line, there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk. *Nash v. United States*, supra; *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). One who goes perilously close to an area of proscribed conduct shall take the risk that he may cross that line. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340.

In summary, on the question of scienter, the Georgia law requires and the jury was instructed that the State must prove, as a bare minimum, that the petitioner had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" is required by *Rosen v. United States*, supra; "in some manner aware" was sufficient in *Mishkin v.*

New York, supra; "reason to know" was sufficient in *Ginsberg v. New York*, supra; "be aware of the character of the matter" was sufficient in *Kuhns v. California*, supra; eyewitness testimony that the appellant perused the book is not necessary, *Smith v. California*, supra; and proof of knowledge of the legal status of the material is not required, *Hamling v. United States*, supra.

The precise scienter question raised by the Petitioner herein has been presented to the court in four cases previously in *Ballew v. Georgia*, 435 U.S. ____ (1978) (No. 76-761. Decided March 21, 1978); *Robinson v. Georgia*, 435 U.S. ____ (1978) (No. 77-915. Decided April 24, 1978); *Sewell v. Georgia*, 435 U.S. ____ (1978) (No. 76-1738. Decided April 24, 1978); and *Teal v. Georgia*, 435 U.S. ____ (1978) (No. 77-790. Decided April 24, 1978).

Ballew, supra, was reversed on the Five-person jury issue and remanded for further proceedings not inconsistent with the court's opinion which did not reach the scienter issue.

In *Robinson*, supra, the judgment was vacated and the case was remanded to the Court of Appeals of Georgia for further consideration in light of *Ballew v. Georgia*, and the scienter issue was not dealt with by the majority.

In *Sewell* and *Teal*, the appeals were dismissed for want of substantial federal question. Since no substantial federal question was raised in *Sewell* and *Teal*, and since the scienter issue raised in each of those cases were precisely the same as that presented by the Petitioner herein, it follows that the scienter issue presented by him raises no substantial federal question.

B.

THE MATERIALS INVOLVED HERE ARE OBSCENE AND ENTITLED TO NO PROTECTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In a review of the Motion Picture Films *Dream Come True* and *The Heist*, the court will find not only nudity and lewd exhibition of the genitals by both males and females, but there are also explicit depictions of ultimate sexual acts. Petitioner contends that these materials do not constitute hard core pornography, and in support of these contentions, appellant cites cases in which convictions were reversed by this court. With the exception of *Jenkins v. Georgia*, 418 U.S. 153 (1974), all the cases cited by the Petitioner were decided during the period between *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973); a period when no majority of the court could agree on a standard to determine what constitutes obscene, pornographic material subject to regulations under the States' police power, and at which time convictions were reversed by the court summarily.

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., *Redrup v. New York*, 386 U.S. at 770-771, 87 S.Ct. at 1415-1416. We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' *Interstate Circuit, Inc. v. Dallas*, 390 U.S., at 704-705, 88 S.Ct. at 1314 (Harlan, J., concurring and dissenting)." . . . *Miller v. California*, 413 U.S. 15, 22, 88 S.Ct. 2607, 2614.

"In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy'. See *Walker v. Ohio*, 398 U.S. 434-435, 90 S.Ct. 1884, 26 L.Ed. 2d 385 (1970) (dissenting opinions of Burger, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California*, 413 U.S. 15, 88 S.Ct. 2607, 2614 (Footnote 3).

In *Jenkins v. Georgia*, supra, the film "Carnal Knowledge" was in question and the scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. Such is not the case in the films in question here, for there the camera does focus on the bodies of the participants.

The Respondent contends that the films are hard core pornography and obscene material when judged by the guide lines established in *Miller v. California*, supra, and the Georgia Obscenity statute, Code Section 26-2101, which is patterned after the *Miller* case.

CONCLUSION

For all the foregoing reasons, Respondent urges this Court to decline to issue the Writ of Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Mail three (3) copies of the foregoing Brief of Respondent in Opposition to the Petition for Writ of Certiorari with first class postage prepaid, addressed to Robert Eugene Smith, Esquire, 1409 Peachtree Street, N.E., Atlanta, Georgia 30309, Attorney for Petitioner.

This _____ day of May, 1978.

LEONARD W. RHODES
Counsel for Respondent

see

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761